Supreme Court, U.S.
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No. 04 323

In The

Supreme Court of the United States

LINDA GIDDINGS,

Petitioner,

vs.

NORTHERN TELECOM and
LIBERTY MUTUAL INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can the Colorado Courts constitutionally omit consideration of the following that underlie an Administrative Law Judge's penalty assessment against an insurance company:

> Denial of prescribed, ordered post-surgical medical care in two respects: psychiatric and "in-home" care;
>
> Failure to pay several hospital, doctor and therapy care bills, as well as old psychiatric bills, in violation of Specific Orders of an Administrative Law Judge; and
>
> The pain, suffering, shock and dismay of Ms. Giddings who had precise orders for the insurance company to do what it refused to do for long periods of time, if ever.

Can the Colorado Courts write a decision that complies with Equal Protection, when it deprives Ms. Giddings of a penalty award and no one else, particularly without considering comparative penalty awards that have been upheld for other such claimants with similar claims or circumstances?

Can the Colorado Courts constitutionally ignore the conduct of the insurance company in failing to comply with the Honorable Administrative Law Judge's orders to provide medical care, in misstating facts in the process and in arguing matters outside of the record at the Appellate level?

LISTING OF PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the lower courts appear here.

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PETITION FOR WRIT OF CERTIORARI

Linda Giddings respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court for the State of Colorado and its lower Appellate Court, the Colorado Court of Appeals.

OPINIONS BELOW

The Colorado Court of Appeals, in its opinion, failed to follow and apply Colorado rule that:

> Once the right to impose a fine has been proved the burden of showing the fine is grossly disproportional shifts to the party upon which the fine is levied. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996).

Here, the insurance company offered no excuse for its longtime non-compliance to provide medical care, as ordered.

There is no finding by any Court or administrative agency as to how the fine is grossly disproportionate to the **conduct** of the insurance company. The Colorado Courts only compared a few of the several bills to the penalty award.

The Colorado Court of Appeals stated at page 6:

[B]ut only contested the remaining $412.40.

The greatest evidence about how the Colorado Court of Appeals only considered what it wanted to, to justify its opinion, is contained at the top of page seven (7) of its opinion:

> Because of the gross disparity between the amount owed by employer (sic) and the aggregate penalty, we conclude that the penalty imposed here was unconstitutionally excessive.

The Colorado Court of Appeals not only did not require the insurance company to prove excessiveness, it unequivocally and inexplicably eliminated all but $412.50 in bills from consideration. It eliminated the denial of medical care in at least two particulars:

Psychiatric; and

In-Home Care.

It eliminated the adverse effects of the denials of medical care.

It eliminated at least six (6) or seven (7) months of violations of the direct orders of the Honorable Administrative Law Judge. (Appendices A-1 through A-6).

It eliminated the misstatements concerning the notice of delinquent bills received, Appendix A-8.

It eliminated the respondents' counsel's arguing matters not in the record on appeal.

It eliminated other non-paid medical bills from consideration.

The Colorado Courts did what no other Court has ever done; they eliminated most of the elements of the damage to the victim and all of the damages to the system. The failure of these Courts to analyze how long and defiantly the 1999 Order of Honorable Administrative Law Judge Felter was violated is irrational.

JURISDICTION

The Order of the Colorado Supreme Court was entered June 7, 2004, Appendix A-1.

The jurisdiction of this Court is respectfully invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

Constitution of the United States: Amendment V, Due Process Clause and Amendment XIV, Due Process Clause.

STATUTORY PROVISIONS

C.R.S. 8-42-101(1)(a) requires reasonable medical care, Appendix B-1.

C.R.S. 8-43-503(3) prohibits the directing of medical care, Appendix B-2.

C.R.S. 8-43-304 authorizes penalties up to $500.00 per day, Appendix B-3.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In the fall of 1999, Ms. Giddings had unpaid bills to Dr. Price, as to which she got an Order to get paid as well as an Order, Appendix A-4, for the insurance company's providing psychiatric and "in-home" care in connection with future, serious surgery.

At the hearing underlying the 1999 Order, Ms. Giddings withdrew her initial request for penalties. Ms. Giddings wanted a simple Order for the insurance company to provide and pay for medical care.

Because the insurance company refused to provide the medical care specifically ordered and because the insurance company continued refusal to pay medical bills for previously authorized medical care, Ms. Giddings asked the Honorable Administrative Law Judge to award penalties on August 21, 2000.

The Honorable Administrative Law Judge from the bench, ordered serious penalties, Appendix A-5; however, in his written Order he declined to order C.R.S. 8-43-304 penalties, Appendix A-6.

In the written Order for August 21, 2000, the Honorable Administrative Law Judge imposed a penalty under 8-43-401(2)(a), C.R.S. 2003, which provides for a penalty of eight percent of the unpaid medical expenses, rather than the general penalty provision in 8-43-304(1), which authorizes a fine of not more than $500 per day. Section 8-43-304(1) provides in pertinent part:

> Any employer or insurer . . . who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or" refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel . . . or fails, neglects, or refuses to obey any lawful order, made by the director or panel . . . shall . . . be punished by a fine of not more than five hundred dollars per day for each such offense . . . '.

The Industrial Claims Appeals Panel upheld the eight percent penalty assessed by the Honorable Administrative Law Judge under 8-43-401(2)(a).

However, in *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001), the Panel's Order was reversed and the case was remanded for further proceedings in reliance upon the supreme court's decision in *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001), which was announced after the Panel's order. In *Holliday*, the Supreme Court held that the failure to comply with an order for payment of medical benefits may be penalized under either 8-43-401(2)(a) or 8-43-304(1).

The division in *Giddings* concluded that an Administrative Law Judge's order for payment of medical benefits is the equivalent of an order by the director for purposes of 8-43-304(1) and that the Administrative Law Judge had the discretion to apply either penalty provision.

Accordingly, it remanded this matter to the Honorable Administrative Law Judge for that determination.

On remand, the Honorable Administrative Law Judge reiterated the findings concerning Gidding's unpaid medical bills and determined that the employer's willful failure to obey the 1999 order resulted in the discontinuation of her psychiatric treatment and retarded her recovery. In light of employer's willful disobedience of the order to pay Giddings's medical benefits, the Honorable Administrative Law Judge ordered a penalty under the general $500-per-day penalty provision. Noting the absence of any evidence of mitigation and the presence of aggravating circumstances, the Honorable Administrative Law Judge concluded that a penalty of $500 per day was warranted. The Honorable Administrative Law Judge imposed a

penalty in an aggregate amount of $91,000, for the period from February 22 through August 21, 2000.

On review, the Panel upheld the penalty. It rejected employer's contention that it had to conduct a de novo review and instead applied an abuse of discretion standard. The Panel concluded that the penalty assessed did not constitute an abuse of discretion when considered in the context of employer's failure to present any explanation why the outstanding bills had not been paid. The Panel declined to consider employer's constitutional arguments and rejected its contention that the imposition of penalties under 8-43-304(1) was an illegal exercise of contempt power.

The respondents, on appeal, caused the Court of Appeals to issue an **unpublished** opinion, Appendix A-3, finding the penalty/fine excessive, despite no evidence ever being produced by the insurance company to that effect.

The Colorado Supreme Court refused to issue Writ of Certiorari on June 7, 2004.

The **unpublished** opinion means that no other person can use that opinion, except it is to be used against Ms. Giddings, Appendix A-3.

SUMMARY OF ARGUMENT

C.R.S. 8-42-101(1)(a) requires reasonable medical care.

C.R.S. 8-43-503(3) prohibits the directing of medical care.

C.R.S. 8-43-304 authorized penalties up to $500.00 per day.

Wolford v. Pinnacol Assurance, 2003 WL 21195401 (Colo. App. 2003) states:

> A fine is a payment to a sovereign as punishment for some offense.

People v. Malone, 923 P.2d 163, 165 (Colo. App. 1995) states:

> . . . [I]n determining the appropriate level of a fine, the court **must** consider the particular financial circumstances of the defendant. (Emphasis Supplied).

The Colorado Court of Appeals' opinion, by overlooking the denial of medical care, the Insurance Company's directing of medical care, after an Administrative Law Judge's precise Order to the contrary, should respectfully not be the law of the case.

Specifically, C.R.S. 8-42-101(1)(a) provides:

. . . .

> Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, . . . as may reasonably be needed at the time of the injury or . . . thereafter . . .

Please see C.R.S. 8-43-503(3):

> Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment . . .

The Colorado Court of Appeals tripped over the deliberate denial of medical care to claimant and improperly ignored that claimant's recovery from very serious surgical procedures had been made more difficult and erroneously said the penalty/fine could only be assessed in proportion to the amount of the old psychiatric bills ordered to be paid.

Colorado has many punitive statutes. Perhaps the best way to start is to look at sentencing in a criminal case.

When a crime is unknowing and victimless, then a sentence is usually less, but within the statutory guidelines.

It is rare, if ever, that an appellate court reverses a sentence that is within the statutory maximum. Please see *Close v. People,* 48 P.3d 528 (Colo. 2002).

When there is a criminal violation that is repetitive, intentional, long-standing and defiant, the system demands a greater penalty.

When there is a victim of the crime that is repetitive, intentional, long-standing and defiant the system mandates an even greater penalty for the wrongdoer.

There are questions and issues as to how badly the victim has been victimized.

It is within reason the sentencing judge's discretion as to what sentence best fits the crime.

Indeed, in Colorado "proportionality" is utilized in some criminal cases. Please see *Close v. People*, 418 P.3d 528 (Colo. 2002).

Here, the claimant got a precise Order for her medical bills, particularly her psychiatric bills to be paid and that she be provided psychiatric care and "in home" care in connection with her serious surgery. Please see the Order attached as Appendix A-4.

There is nothing "of record" that indicates that psychiatric bills have ever been paid. Please see Appendix A-7.

The Honorable Administrative Law Judge failed to calculate the number of days associated with each deliberate nonpayment of each bill.

The insurance company has never put on evidence of payment of any bill.

The insurance company, by its representative, misstated the facts as to receiving demands for payment of bills. Please see Appendix A-5, part of the transcript from the August 20, 2001 hearing.

In Criminal sentencing, if the defendant's representative misstates any fact, that misrepresentation is a factor in sentencing.

The Court of Appeals overlooked and/or misapprehended some of the partially applicable language of *May v. Colo. Civil Rights Commission,* 43 P.3d 750 (Colo. App. 2002 at headnotes 22 and 23):

> The Commission may also assess a civil **penalty** against the respondent . . . The **amount** of a civil penalty, which is payable to the state, should be proportional to the **seriousness of the conduct**. *See Szkoda v. Illinois Human Rights Commission*, 302 Ill.App.3d 532, 236 Ill.Dec. 88, 706 N.E.2d 962 (1998) (interpreting a similar

provision of the Illinois Human Rights Act); *see also Morgan v. Secretary of Housing & Urban Development, supra*, 985 F.2d at 1461. (Emphasis Supplied).

The purpose of civil penalties include compensating the public by shifting costs from the public to the perpetrator, *see True v. United States*, 894 F.2d 1197 (10th Cir.1990), **deterring future harmful conduct**, *see May Dep't Stores Co. v. State ex rel. Woodard,* 863 P.2d 967 (Colo. 1993), and punishing the perpetrator, *see Hall v. Walter,* 969 P.2d 224 (Colo. 1998) . . . (Emphasis Supplied).

. . . .

In *May Dep't Stores Co. v. State ex rel. Woodard, supra,* 863 P.2d at 972, the supreme court explained the purpose of civil **penalties** in the context of a consumer fraud case:

> Civil **penalties** serve several important functions, one of which is as a **deterrent** against future unlawful practices . . . [T]he purpose of the civil damage award in this case is not to make an injured party whole, but to **punish** wrongdoers for illegal acts. . . . The **deterrent** goal is also demonstrated by the fact the award of monetary damages in civil penalties is to the State and not to the harmed individual. (Emphasis Supplied).
>
> Because the [Colorado Consumer Protection Act (CCPA)] civil **penalty** requirement is intended to punish and deter the wrongdoer and not to compensate the injured party, the CCPA is intended to proscribe deceptive acts and not the consequences of those acts.

How do you deter an entity worth many billions such as respondent?

How do you get the attention of such an entity that does not make any excuse or contest anything?

Is it not serious that respondent was able to avoid its statutory duties and order responsibilities to provide certain medical care?

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

What two concepts are more fundamental than that:

> AN APPEAL IS TO BE DETERMINED UPON THE BASIS OF THE RECORD; and
>
> ON APPEAL THE SAME LAW THAT CONTINUES TO BE APPLICABLE TO EVERYONE ELSE IS APPLICABLE TO THE PARTIES TO THE APPEAL IN QUESTION.

Neither happened here.

The decision of the Colorado Court of Appeals, attached as Appendix A-2, wrongfully usurps the legislative jurisdiction of the Colorado Legislature and does it specially against Linda Giddings by its **non-published** opinion policy, attached as Appendix A-3.

The December 24, 2003 opinion only affects Ms. Giddings, Appendix A-2.

II. THE DECISIONS BELOW ARE UNCONSTITUTIONAL

Administrative Law Judge Felter had previously said concerning the Insurance Company's conduct in this case:

> I've never seen anything like this . . . I mean the system would fall apart if other cases were handled this way. (Transcript for August 21, 2000, P.30, Ls.3-5, Appendix A-5).

This "unpublished" opinion, Appendix A-2, respectfully failed to follow previous decisions:

> *Pueblo School District No. 7 v. Toth*, 924 P.2d 1094, 1100 (Colo. 1996);
>
> *People v. Malone*, 923 P.2d 163, 165 (Colo. App. 1995);
>
> *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246, 252 (Colo. 1996); and
>
> *Woodco v. Lindahl*, 380 P.2d 234 (Colo. 1963).

The Colorado Courts did not consider that, even if the Dr. Price bills were paid "days after the August 21, 2000 penalty hearing," as improperly represented by the Insurance Company at oral argument because not a part of record, they were paid more than two (2) years after they were due and seven (7) months after being ordered to be paid.

The Colorado Courts did not consider the numerous other bills and the effects of their delay or nonpayment.

The Colorado Court of Appeals failed to recognize the catastrophic harm it has done and is doing to the administration of the Act that mandates that authorized medical

bills must be promptly paid to avoid medical services being denied or delayed.

The insurer has never openly with notice, contested any medical bill, nor any type of ordered care.

The insurer has never given any hint of remorse.

The insurer has never given any excuse for its conduct.

The insurer throughout, by its conduct, has repeatedly said "Catch me if you can."

The insurer also failed to pay several other medical bills that were written off.

The insurer, by its not paying medical bills, diminished the types of medical care petitioner/claimant was able to receive, to her detriment.

The insurer limited the care petitioner/claimant received by its not following the Orders of Administrative Law Judge Felter.

The insurer in oral argument, not by the record, claims in September of 2000 to have paid the psychiatric bills that pre-existed the 1999 Order. Petitioner/Claimant believes some sort of partial payment was made in September 2000. Whatever was paid was not enough to cause Ms. Giddings' psychiatrist to treat her, Ms. Giddings, ever again.

The Insurance Company made a decision in 1999 to disallow needed psychiatric care and "in-home" care, by not paying for the claimant's prior medical bills.

Psychiatrist Price had bills for June 19, 1998, June 26, 1998 and October 16, 1999 that were still unpaid as of August 21, 2000. (Exhibit Eight [8] admitted into evidence at the August 21, 2000 hearing).

The Insurance Company has never given any excuse for its failure to pay the medical bills promptly. They just were not paid.

Because of the 1998 medical bills that were not paid by Liberty Mutual Insurance and because claimant was about to have a "left supraclavicular brachial plexus release, scalenotomies and a possible first rib resection and release of the claimant's frozen left shoulder" (paragraph 4 of Order of November 22, 1999, Appendix A-4), claimant obtained the following, unappealed Order:

FINDINGS OF FACT

. . . .

7. Dr. Price has diagnosed the Claimant as having major depression, . . . secondary to her job-related shoulder problems. The undersigned Administrative Law Judge finds that the Claimant's psychiatric diagnosis and treatment is causally connected to her admitted work-related injury of March 22, 1996, and her need for continuing psychiatric treatment and a psychiatric regimen is causally connected to the admitted injury.

. . . .

Based upon the above Findings of Fact, the undersigned Administrative Law Judge makes the following Conclusions of Law:

a. The . . . surgery . . . is authorized pursuant to the provisions of Section 8-42-101(1)(a), C.R.S. (1999).

b. The psychiatric care and treatment recommended by Dr. Price, and sought by the Claimant, is causally connected and reasonable and necessary, since the Workers' Compensation Act contemplates that an employer provide **all** treatments reasonably necessary to relieve a Claimant from the effects of industrial injuries. *Durango v. Dunagan,* 939 P.2d 496, 499 (Colo. App. 1997). (Emphasis Supplied).

. . .

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all medical costs connected with Claimant's medical treatment, the recommended surgeries and the recommended psychiatric care and treatment, as well as the expenses of pre-surgical and pre-preparation and treatment. . . .

B. Respondents shall pay for all of the Claimant's reasonable and necessary psychiatric care and treatment related to the admitted compensable injury of March 22, 1996.

. . . .

The Judge made the following unappealed, additional Findings of Fact on August 21, 2000:

FINDINGS OF FACT

. . . .

Dr. Price, as of August 4, 2000, had previously filed these charges with the insurance company, but the $412.40 has not been paid to date. The

ALJ infers that Respondents willfully and wantonly failed to pay these ordered charges in direct disobedience to a final order of an ALJ.

10. Because Dr. Price's bills have not been paid, he will not provide claimant further psychiatric care. Claimant tried to call Dr. Price recently, but he did not return her call.

. . . .

14. Respondent insurer, knew of Dr. Price's unpaid bills before October 28, 1998, and November 22, 1998.

15. Respondents have failed to pay, or delayed in paying the following other medical bills, that claimant incurred for the treatment of her work related injuries:

> Inland Imaging of February 15, 2000, "written off" as of August 16, 2000;
>
> . . . .
>
> Oregon Health Sciences University for $162.40 from October 8, 1999, and November 12, 1999, as of March 11, 2000, and January 12, 2000 (a non-payment of over thirty days, after notice, is undisputed);
>
> . . . .
>
> Whitman Hospital for $85.00 from February 14, 2000, as of August 10, 2000 (a non-payment of over thirty days, after notice, is proved); and
>
> Dr. French for RN surgical assistant from February 14/15, 2000, as of August 21, 2000.

> 16. Dr. French prescribed one month "In-Home Care" for claimant, which was requested for claimant, . . .
>
> 17. As to the failure to comply with the Administrative Law Judge's order to provide reasonable and necessary care: after October 16, 1999, psychiatric care, there has been no care by Dr. Price; after the surgery of February 14/15, 2000, there has never been any in-home care provided to claimant; and, after the April 7, 2000, letter of Dr. Price, there has been no psychiatric care for claimant.
>
> 18. The ALJ infers that if Dr. Price's bill had been paid, he would have been more available to claimant and that claimant probably would have had additional psychiatric consultation or treatment.

On February 12, 2002, the Honorable Administrative Law Judge made additional findings that have not been reversed:

. . . .

> 9. . . . Respondents offered no persuasive evidence in mitigation of their failure to obey the ALJ's November 22, 1999 Order.
>
> 10. . . . Although it is reasonable for a physician to refuse care without some assurance of payment therefore, it is unreasonable, egregious, and an aggravating factor for Respondents to deliberately fail to obey an ALJ's Order to make such payment.

. . . .

> 18. . . . The ALJ further finds that Respondents' failure to obey the ALJ's November 22,

1999 Order has retarded claimant's recovery from the effects of her admitted, compensable injury.

19. . . . The claimant has further proven aggravating circumstances and Respondents have failed to prove any mitigating circumstances.

CONCLUSION

The Petition for a Writ of Certiorari should, respectfully, be granted.

Respectfully submitted,

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No. _____

In The
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LINDA GIDDINGS,

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NORTHERN TELECOM and
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APPENDIX

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APPENDIX A-1

SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 CERTIORARI TO COURT OF APPEALS, 02CA2052 INDUSTRIAL CLAIMS APPEAL OFFICE, WC #4-293-203	CASE NO. 04SC16
Petitioner/Cross-Respondent: LINDA GIDDINGS, v. **Respondents/Cross-Petitioners:** NORTHERN TELECOM and LIBERTY MUTUAL INSURANCE COMPANY, and **Respondent:** INDUSTRIAL CLAIM APPEALS OFFICE OF THE STATE OF COLORADO.	
ORDER OF COURT	

Upon consideration of the Petition and Cross-Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition and Cross-Petition for Writ of Certiorari shall be, and the same hereby are, DENIED.

BY THE COURT, EN BANC, JUNE 07, 2004.

[SEAL]

Copies mailed via the State's Mail Services Division on 06/07/04. MLK

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Clerk of the Court
Colorado Court of Appeals

APPENDIX A-2

COLORADO COURT OF APPEALS

Court of Appeals No. 02CA2052
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-293-203

Northern Telecom, Inc. and Liberty Mutual Insurance Company,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Linda Giddings,

Respondents.

ORDER SET ASIDE AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE MARQUEZ
Rothenberg and Graham, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
December 24, 2003

Law Offices of Jonathan S. Robbins, David G. Kroll, Denver, Colorado, for Petitioners

No Appearance for Respondent Industrial Claim Appeals Office Jack Kintzele, Denver, Colorado, for Respondent Linda Giddings

In this workers' compensation proceeding, Northern Telecom, Inc. and its insurer, Liberty Mutual Insurance

Company (collectively employer), seek review of the final order issued by the Industrial Claim Appeals Office (Panel) upholding the imposition of penalties pursuant to § 8-43-304(1), C.R.S. 2003. We set the order aside and remand for further proceedings.

Linda Giddings sustained admitted industrial injuries in 1996. In a 1999 order, the administrative law judge (ALJ) found that all the medical and psychiatric treatment recommended for Giddings was reasonable, necessary, and causally connected to her work injuries. The ALJ, therefore, directed employer to pay for the surgical and psychiatric treatment recommended by the treating physicians. That order was not appealed.

In a subsequent order, the ALJ found that three bills related to Giddings's psychiatric care remained unpaid. These bills totaled $412.40 and were incurred prior to the 1999 order. The ALJ observed that employer had offered no persuasive evidence of mitigation for its failure to pay and, therefore, inferred that employer had willfully and wantonly failed to pay the ordered charges in direct disobedience of the 1999 order. The ALJ also found that because of the outstanding bills, Giddings's treating psychiatrist had reasonably refused to provide further psychiatric care.

Originally, the ALJ imposed a penalty under § 8-43-401(2)(a), C.R.S. 2003, which provides for a penalty of eight percent of the unpaid medical expenses, rather than the general penalty provision in § 8-43-304(1), which authorizes a fine of not more than $500 per day. Section 8-43-304(1) provides in pertinent part:

> Any employer or insurer . . . who violates any provision of articles 40 to 47 of this title, or does

> any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel . . . or fails, neglects, or refuses to obey any lawful order made by the director or panel . . . shall . . . be punished by a fine of not more than five hundred dollars per day for each such offense. . . .

The Panel upheld the eight percent penalty assessed by the ALJ under § 8-43-401(2)(a).

However, in *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001), the Panel's order was reversed, and the case was remanded for further proceedings in reliance upon the supreme court's decision in *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001), which was announced after the Panel's order. In *Holliday,* the supreme court held that the failure to comply with an order for payment of medical benefits may be penalized under either § 8-43-401(2)(a) or § 8-43-304(1).

The division in *Giddings* concluded that an ALJ's order for payment of medical benefits is the equivalent of an order by the director for purposes of § 8-43-304(1) and that the ALJ had the discretion to apply either penalty provision. Accordingly, it remanded this matter to the ALJ for that determination.

On remand, the ALJ reiterated the findings concerning Giddings's unpaid psychiatric bills and determined that employer's willful failure to obey the 1999 order resulted in the discontinuation of her psychiatric treatment and retarded her recovery. In light of employer's willful disobedience of the order to pay Giddings's medical benefits, the ALJ favored a penalty under the general $500-per-day penalty provision. Noting the absence of

persuasive evidence of mitigation and the presence of aggravating circumstances, the ALJ concluded that a penalty of $500 per day was warranted. The ALJ imposed a penalty in an aggregate amount of $91,000, for the period from February 22 through August 21, 2000. Seventy-five percent was to be paid to Giddings and twenty-five percent to the Subsequent Injury Fund. Employer was also ordered to pay interest of eight percent per annum on all amounts determined due and not paid when due.

On review, the Panel upheld the penalty. It rejected employer's contention that it had to conduct a de novo review, and instead applied an abuse of discretion standard. The Panel concluded that the penalty assessed did not constitute an abuse of discretion when considered in the context of employer's failure to present any explanation why the outstanding bills had not been paid. The Panel declined to consider employer's constitutional arguments and rejected its contention that the imposition of penalties under § 8-43-304(1) was an illegal exercise of the contempt powers prohibited by § 8-43-207(1)(p), C.R.S. 2003.

This appeal followed.

I.

Employer has not asserted a legal challenge to the maximum fine permitted by § 8-43-304(1). Rather, employer contends that the penalty is excessive and violates the due process protections guaranteed by the federal and state constitutions and the excessive fines clause of the Eighth Amendment. Employer also contends that the Panel erred in failing to apply the de novo standard of review applicable to punitive damage awards, pursuant to

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001). We conclude the Panel applied the correct legal standard, but the fine imposed was excessive and must be set aside.

Under § 8-43-304(1), any employer or insurer who fails, neglects, or refuses to obey any lawful order for payment of medical benefits is subject to a fine. *See Holliday v. Bestop, Inc., supra.* However, the Eighth Amendment and Colo. Const. art. II, § 20 prohibit the imposition of "excessive fines." *Wolford v. Pinnacol Assurance,* ___ P.3d ___ (Colo. App. No. 01CA2415, May 22, 2003). The amount of a civil penalty that is payable to the state should be proportional to the seriousness of the conduct. *May v. Colo. Civil Rights Comm'n,* 43 P.3d 750 (Colo. App. 2002).

Once the right to impose a fine has been proved, the burden of showing the fine is grossly disproportionate shifts to the party upon whom the fine is levied. *Pueblo Sch. Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996).

A. Standard of Review

In *Cooper Industries, supra,* the Supreme Court held that when a punitive damages award is reviewed for excessiveness under the Due Process Clause, a de novo standard of review should be applied based upon three criteria: (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Cooper Indus.,*

Inc. v. Leatherman Tool Group, Inc., supra, 532 U.S. at 440, 121 S.Ct. at 1687.

However, the Supreme Court stated in *Cooper* that penalties imposed under legislatively enacted guidelines are reviewed under an abuse of discretion standard. The Panel relied on *Cooper* and considered whether the legislatively enacted penalty imposed by the ALJ constituted an abuse of discretion.

We conclude that *Cooper* does not mandate a de novo standard of review for legislatively enacted penalties and fines, but only for punitive damages awards. Thus, we apply an abuse of discretion standard to the fine imposed here.

B. Excessiveness

Penalties may be imposed to deter misconduct of both employers and employees. *See Lori's Family Dining, Inc. v. Indus. Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

A penalty imposed under § 8-43-304(1) may appear severe when measured against the actual monetary harm caused by the misconduct. However, the effect of the misconduct on an injured worker struggling to obtain medical treatment and to pay basic household expenses may be devastating. Consequently, the penalty range authorized under § 8-43-304(1) gives effect to the goal of the Workers' Compensation Act to provide benefits in a quick and affordable manner. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997).

Nevertheless, we conclude that the penalty imposed here was grossly disproportionate to employer's conduct and must be set aside.

The ALJ found that Giddings's psychiatrist suspended treatment for the industrial injury because of the unpaid expenses, that her recovery was negatively affected as a result, and that employer acted in a willful and wanton manner in failing to pay the ordered charges. Consequently, a substantial penalty was appropriate.

However, after being so ordered by the ALJ, employer paid a number of Giddings's bills, delayed paying others, but only contested the remaining $412.40. The ALJ imposed the $91,000 penalty for employer's failure to pay the $412.40 bill. Because of the gross disparity between the amount owed by employer and the aggregate penalty, we conclude that the penalty imposed here was unconstitutionally excessive.

II.

However, we reject employer's contention that the ALJ imposed the penalty to insure compliance with the 1999 order requiring payment so that the penalty constitutes an improper exercise of the contempt power.

Section 8-43-207(1)(p) provides that "In connection with hearings, the director and administrative law judges are empowered to . . . [i]mpose the sanctions, provided in the Colorado rules of civil procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an administrative law judge issued pursuant to articles 40 to 47 of this title."

Section 8-43-207(1)(p) recognizes that willful failure to comply with an ALJ's order may be punished in various ways, but it does not authorize an ALJ to impose the sanction of contempt. The sanction here was not imposed under C.R.C.P. 107, but rather under § 8-43-304(1).

Further, the division in *Giddings* held that when an order requires the payment of medical benefits, the ALJ may impose penalties based on either statute. It also noted that the definition of an "order" under the Act includes any decision or determination arrived at by the director or an ALJ. *See* § 8-40-201(15), C.R.S. 2003.

Therefore, we agree with the Panel that the ALJ is not precluded from imposing sanctions under § 8-43-304(1) here.

The Panel's order is set aside, and the case is remanded for reconsideration of the penalty. Any fine imposed must be proportionate to employer's conduct.

JUDGE ROTHENBERG and JUDGE GRAHAM concur.

APPENDIX A-3

Court of Appeals
STATE OF COLORADO
2 EAST FOURTEENTH AVENUE, SUTIE 300
DENVER, COLORADO 80203
(303) 861-1111

POLICY OF THE COURT CONCERNING CITATION OF UNPUBLISHED OPINIONS

By majority vote of the Judges of the Colorado Court of Appeals, the following policy was adopted concerning citation of unpublished opinions:

Citation of unpublished opinions is forbidden, with the following exceptions:

(1) Unpublished opinions may be cited to explain the case history or to establish the doctrines of law of the case, *res judicata*, or collateral estoppel;

(2) This policy shall not apply to opinions that were designated as "Not Selected for Official Publication" and were announced between January 1, 1970 and November 1, 1975, but nevertheless were published in the Pacific Second Reporter.

By The Court: Janice B. Davidson
Chief Judge

POLICY ADOPTED: April 28, 1994

Published at 23 Colo. Lawyer 1548 (July 1994).

APPENDIX A-4

STATE OF COLORADO
EXECUTIVE DEPARTMENT

W.C. No. 4-293-203

SPECIFIC FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

LINDA GIDDINGS,

Claimant,

vs.

NORTHERN TELECOM,
Employer,

and

LIBERTY MUTUAL INSURANCE CO.,
Insurer/Respondents.

Hearing in the above-captioned matter was held on October 26, 1999, in Denver, Colorado, before Edwin L. Felter, Jr., Administrative Law Judge, Colorado Division of Administrative Hearings. The court reporter was Debbie Chenoweth.

Claimant appeared, telephonically, pursuant to an order of the undersigned Administrative Law Judge, dated August 16, 1999, and was represented by Jack Kintzele Esq., who appeared in person. Respondents were represented by David G. Kroll.

The issue to be determined by this decision concerns medical benefits, specifically authorization, reasonable and necessary and causal connectedness to the admitted work related injury. At the commencement of the hearing, Claimant withdrew the issue of penalties against the Respondents.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the undersigned Administrative Judge makes the Findings of Fact:

1. The Claimant sustained an admitted work-related injury to her extremity, consisting of bilateral thoracic outlet syndrome, on March 25, 1996.

2. On September 16, 1998, Respondents filed a General Admission, admitting for temporary total disability benefits of $389.87 per week from March 24, 1996 to July 31, 1996 inclusive, and for $342.56 per week from August 1, 1998 to September 9, 1998; also, from September 10, 1998 to "unknown."

3. There is no dispute that Robin K.J.S. Dhillon, M.D., a thoracic and general surgeon, H. Graeme French, M.D., a Board certified orthopedic surgeon and Richard F. Price, M.D., a psychiatrist, were within the authorized chain of referrals and, therefore, authorized physicians, and the undersigned Administrative Law Judge so finds.

4. Since December 1997, Dr. Dhillon has recommended a left supraclavicular brachial plexus release, scalenotomies, and a possible first rib resection and release of the Claimant's frozen left shoulder.

5. Dr. French recommends neurolysis or freeing of the nerves.

6. Drs. Dhillon and French planned on doing the operation on the Claimant's left upper body at the same time in one operation. By letter of November 3, 1999, counsel for Claimant advises that Dr. Dhillon retired. Therefore, Dr. French will do the surgery alone.

7. Dr. Price has diagnosed the Claimant as having major depression, moderate, recurrent, and chronic pain syndrome, secondary to her job-related shoulder problems. The undersigned Administrative Law Judge finds that the Claimant's psychiatric diagnoses and treatment is causally connected to her admitted work-related injury of March 22, 1996, and her need for continuing psychiatric treatment and a psychiatric regimen is causally connected to the admitted injury.

8. Although the Claimant knows the risks of the surgical alternatives recommended, she wishes to proceed with surgery since she has been totally unable to work or otherwise function well as a result of the problems related to her admitted injury.

9. All of the surgical, medical and psychiatric treatment recommended for the Claimant is reasonable, necessary and causally connected to her admitted compensable injury of March 26, 1996.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the undersigned Administrative Law Judge makes the following Conclusions of Law:

a. The thoracic, orthopedic surgery recommended by the treating physicians, and sought by the Claimant, being causally connected and reasonable and necessary to cure and relieve the effects of the Claimant's admitted injury, is authorized pursuant to the provisions of Section 8-42-101(1)(a), C.R.S. (1999).

b. The psychiatric care and treatment recommended by Dr. Price, and sought by the Claimant, is causally connected and reasonable and necessary, since the Workers' Compensation Act contemplates that an employer provide **all** treatments reasonably necessary to relieve a Claimant from the effects of industrial injuries. *Durango v. Dinagan*, 939 P.2d 496, 499 (Colo. App. 1997).

ORDER

IT IS, THEREFORE, ORDERED, THAT:

A. Respondents shall pay all medical costs connected with Claimant's medical treatment, the recommended surgeries and the recommended psychiatric care and treatment, as well as the expenses of pre-surgical and pre-preparation and treatment. Claimant's treating physicians shall confer, work out and agree on the surgery or surgeries to be performed, as well as the time of the surgery or surgeries.

B. Respondents shall pay for all of the Claimant's reasonable and necessary psychiatric care and treatment related to the admitted compensable injury of March 22, 1996.

C. Respondents shall pay Claimant interest at the rate of 8% per annum on all amounts of compensation due, not paid when due, pursuant to statute.

D. All issues not determined herein are reserved for future decision.

DATED this 22 day of November, 1999.

/s/ Edwin L. Felter, Jr.
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the Administrative Law Judge is final unless a Petition to Review this decision is filed within twenty (20) days from the date this decision is mailed. The Petition to Review should be filed at the Division of Administrative Hearings, 1120 Lincoln Street, Suite 1400, Denver, Colorado 80203.

APPENDIX A-5

STATE OF COLORADO
EXECUTIVE DEPARTMENT
CASE W.C. No. 4-293-203

IN THE MATTER OF THE CLAIM OF LINDA GIDDINGS, Claimant, vs. NORTHERN TELECOM, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurer, Respondent.	TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing pursuant to notice on August 21, 2000, in the offices of the Division of Administrative Hearings, The Chancery, 1120 Lincoln Street, Suite 1400, Denver, Colorado, before:

EDWIN FELTER, JR., Administrative Law Judge

APPEARANCES:

For the Claimant: Jack Kintzele, Esq.

For the Respondents: David Kroll, Esq.

[2] INDEX

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
Claimant's:				
Linda Giddings	21	25	–	–

* * *

[33] JUDGE FELTER: Right.

MR. KROLL: – (inaudible) generated (inaudible) and so on.

JUDGE FELTER: Oh. All right, I've got it.

MR. KROLL: And essentially on the same – as far as the Whitman goes, of course, as I indicated, I didn't think that was the issue that was being pursued here, but once again –

JUDGE FELTER: How much more do you have in terms of argument?

MR. KROLL: That's really about it because there just really isn't any evidence to show a willful failure to pay these bills within a timely period.

JUDGE FELTER: Okay. Mr. Kintzele, do you have a brief response? We might as well keep the doctors and everyone else waiting out there as long as we can.

MR. KINTZELE: 90 seconds. Your Honor ordered psychiatric care, Your Honor ordered bills be paid (inaudible). One of the things not found in the *Holiday* case was there wasn't any finding that care was denied because of lack of payment of the bill. That case is definitely our case.

JUDGE FELTER: Well, this case wasn't based on an order – the failure to pay was allegedly in violation of a stipulation to arise out of the pretrial conference, wasn't [34] it?

MR. KINTZELE: Correct.

JUDGE FELTER: Okay.

MR. KINTZELE: A year and five days ago you ordered that she be provided psychiatric care, a year and five days ago you ordered that the bills be paid, a year and five days ago you made it clear that she would get all the necessary care that she needed to recover. The *Holiday* case doesn't cover any of that, and with all great respect for Justice Erickson –

JUDGE FELTER: Justice Erickson, you're talking about – you mean not Bill Erickson?

MR. KINTZELE: Yes, I am.

JUDGE FELTER: Oh, was it Bill Erickson? I think that's right, yeah.

MR. KINTZELE: Every (inaudible) decision he's written in Worker's Comp has been turned over by Colorado Supreme Court and it has been granted in this case –

JUDGE FELTER: Oh, Mr. Kintzele, I –

MR. KINTZELE: I understand.

JUDGE FELTER: – that's not a – I mean, I don't want to hear that, certainly.

MR. KINTZELE: I apologize for that, Your Honor, but the fault of the *Holiday* case is it violates (inaudible). It (inaudible) the statute in favor of the

employer and seven [35] employees violated about 100 safety –

JUDGE FELTER: Has the *Holiday* case been overturned by the Supreme Court?

MR. KINTZELE: Not yet. It will be.

JUDGE FELTER: Okay. You hope so, anyway.

MR. KINTZELE: Judge, if it's not – and this is my last ten seconds – if it's not, we desperately need a statute in Colorado that provides penalties for denial of medical treatment. Because that's what this case is, it's happening all the time, and if that case is good law and if this case doesn't require $500 today going back to March 20th, Exhibit 6, if it doesn't require, then doggone it, insurance companies can just walk away from medical treatment.

JUDGE FELTER: You're asking me to now be a legislator, Mr. Kintzele.

MR. KINTZELE: I'm not, Judge.

JUDGE FELTER: Okay.

MR. KINTZELE: I'm asking you to go to your roots.

JUDGE FELTER: Oh, go to my roots. Okay. Grounded in fundamental fairness, due process and all that stuff.

MR. KINTZELE: You bet.

JUDGE FELTER: I have to pay attention to the case law, too, though.

MR. KINTZELE: Absolutely.

JUDGE FELTER: Okay. Okay, actually, that was a [36] closing closing. My determination is twofold. First of all, the *Holiday* case is still valid law, but – and it's distinguishable from the facts here – one, well, the Court made – I don't know if – the facts are dissimilar enough the Court made a distinction in *Holiday* between not paying medical bills and then the Court somehow ducked the issue of violation of a stipulation, which is different anyway.

It's my determination, one (inaudible) looking at these aggregate exhibits that have been admitted into evidence, my order of November 22nd, 1999, was very clear as to payment of Dr. Price. I can't tell from the others, there are gaps, but I have to say, you know, this type of payment conduct on the part of an insurance carrier can't really be condoned as subversive to the administration of justice, especially with Dr. Price. What good are orders, why should I sit up here and enter orders when they can be disregarded with impunity or someone just sits back saying, "Well, maybe they can't prove willful." My inference with respect to Dr. Price is that there's been a willful failure to pay because whatever was paid, I mean, you can't just pay a fourth of a loaf. Up until recent times the evidence shows Dr. Price has not been paid and he's gotten to the point where he won't provide further medical treatment.

I don't think the carrier, you know, (inaudible) and the carrier can't just sit back and say, "Well, prove it, [37] prove that someone willfully hasn't been paid. We know the person hasn't been paid in full, but you prove that that person hasn't willfully been paid." Well, it can be proven

through inference. One, the person hasn't been paid, two, there's an order of November of '99 specifically ordering payment of Price, talking at great length about psychiatric treatment.

So as to Price not being paid, we're dealing – I find in the inferences I can draw from the evidence to find that there's been a willful failure not to pay Price what he has billed. There's no evidence whatsoever, there's not a shred of evidence that there's some dispute over the fee schedule. And while Mr. Kroll may have – quite frankly, he may have created some reasonable doubt, but that's not enough. The standard of proof is by a preponderance, not beyond a reasonable doubt. If we were going to convict the carrier of some crime, they might be acquitted under these set of facts and circumstances, but all the plaintiff's required to do is prove by a preponderance of the evidence that there's been a willful failure to pay – not to pay, strike that. In the case of Dr. Price, there's been a willful disobedience to a final order of an administrative law judge, specific findings of fact, dated November 22nd, 1999. The penalty – I mean, there weren't specifics, we don't have all afternoon, but 60 days is a reasonable time within [38] which to pay a bill and it becomes stale after that. I'll just take administrative notice, if anyone has a problem with it, pop up, but you can get away without paying almost any bill for 60 days after receiving it without getting black listed or having adverse credit. Now, you can get some dun letters, I mean 30 days is for the good credit rating, but – so any bills of Dr. Price submitted within – and not paid within 60 days of submission to the insurance carrier, that's when the clock starts running on disobedience of an order, my order. And that's – I see no mitigation whatsoever, that's $500 a day

for every day over 60 days after submission of the bill to the carrier that it wasn't paid.

As far as the other medical bills, that's another area. I know I've ordered payment, but I'm not – it's sort of a generalized order, it's not specific enough to show a willful disobedience of the order. However, for any other delays, the carrier is liable for the eight percent – other medical bills. And I mean this is – quite frankly, I mean, I've never seen anything like this where we have write-offs of bills. I don't know what they do because the carrier is – I don't know what reason. The carrier, it's up to the carrier. I mean, once the claimant has shown these bills haven't been paid pursuant to an order or otherwise, it's up to the carrier to show a reason at some point, not to just sit back and say, "Well, you can't prove willfulness, try [39] it." You can prove willfulness by someone's actions or inactions – on the inferences that I have drawn from those. So I've never seen anything like this, the write-offs. I mean, the system would fall apart if other cases were handled this way.

So eight percent interest on the other bills. Say *Holiday* has any application or I do make a distinction between simple non-payment of medical bills and disobedience of an order. I don't see any case law out there that says once an ALJ has entered an order that becomes final and not appealed and ordering payment of medical bills where a carrier can say, "Well, no sweat, we don't have to obey that order because maybe we can get better than eight percent on our money in the investment market," which is possible. I'm not saying anyone would do that, but just objectively the motivation could be there to delay obeying an order in order to get a float on the money. But I'm not saying this carrier has done that, I'm just analyzing the situation and

analyzing the underlying reasons why I'm making that distinction. An order is an order. This wasn't a stipulation arrived at at a prehearing, this was an order of mine ordering payment of specific medical bills that was neither appealed nor complied with.

So I know that's kind of vague. Mr. Kintzele, would you be good enough to prepare and submit detailed [40] proposed specific findings, facts, conclusions of law and order within ten days?

MR. KINTZELE: Yes, Your Honor.

JUDGE FELTER: And do you have e-mail capability, Mr. Kintzele?

MR. KINTZELE: I do.

JUDGE FELTER: Can you get me – get it to me with a WordPerfect attachment?

MR. KINTZELE: I'll do my very best.

JUDGE FELTER: Do you have a secretary who knows how to do that sort of thing?

MR. KINTZELE: She's good.

JUDGE FELTER: Okay. If you can't, just give me a WordPerfect disk with the proposed orders.

MR. KINTZELE: Okay.

JUDGE FELTER: Okay. Anything further, Mr. Kintzele?

MR. KINTZELE: May I hang up on my client?

JUDGE FELTER: Yes, you may – Ms. Giddings, that concludes the hearing, and Mr. Kintzele is going to hang up on you.

THE CLAIMANT: Okay.

JUDGE FELTER: Okay, good, now we know you're with us. Okay.

Anything further, Mr. Kroll?

[41] MR. KROLL: Well, Your Honor, the only – I don't want to –

JUDGE FELTER: I've made a ruling, now what, do you want to start arguing the appeal now?

MR. KROLL: Well, another thing I wanted to point out was the fact that *Holiday* was (inaudible).

JUDGE FELTER: Post mortem, I mean, save your breath –

MR. KROLL: I know, I know, I just –

JUDGE FELTER: – if you're going to appeal, put it in your brief to ICAP.

MR. KROLL: Well, I know that you said that it wasn't in fact distinguishable because it was an order (inaudible) I just want to –

JUDGE FELTER: It may have been – that's your argument that it had the dignity of an order, but I make a distinction here in my holding –

MR. KROLL: (Inaudible.)

JUDGE FELTER: No, no, let me say that since we brought that up. Non-payment of Dr. Price's medical

bills has nothing to do with it, it's disobedience of my order, which is a final order, which it differed from the holding in *Holiday* in my mind, so – besides that, I buy into *Holiday* as to the other medical bills. That rationale is good, it's eight percent for the others.

[42] Okay, anything further, gentlemen?

UNIDENTIFIED SPEAKER: Thank you, Judge.

JUDGE FELTER: Okay, we'll be adjourned.

(Whereupon, the hearing was concluded.)

[43] TRANSCRIBER'S CERTIFICATE

I, Laurie M. Warner, hereby certify that the foregoing constitutes a true and accurate transcript of all audible testimony at a hearing regarding Case W.C. No. 4-293-203, before the Division of Administrative Hearings, on August 21, 2000, which said hearing was mechanically recorded by the Division of Administrative Hearings and transcribed by me to the best of my ability.

Dated at Denver, Colorado, this 25th day of September, 2000.

/s/ Laurie M. Werner by st
Federal Reporting
Service, Inc.
17454 East Asbury Place
Aurora, CO 80013
303-751-2777

APPENDIX A-6

STATE OF COLORADO
EXECUTIVE DEPARTMENT

Worker's Compensation No. 4-293-203

SPECIFIC FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

LINDA GIDDINGS,

Claimant,

v

NORTHERN TELECOM,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurer,
Respondent.

Hearing in the above-captioned matter was held on August 21, 2000, in Denver, Colorado, before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), Colorado Division of Administration Hearings. The proceedings were tape recorded.

Claimant appeared, telephonically, pursuant to an order of ALJ Michael E. Harr, dated June 12, 2000, and was represented by Jack Kintzele, Esq. Respondents were represented by David G. Kroll, Esq.

The issues to be determined are penalties for failure to provide psychiatric medical care in violation of an explicit ALJ Order, which was not appealed and became final, contrary to the provisions of Section 8-43-304 (1), C.R.S. (1999), the general $500 per day penalty provision, and failure to pay medical expenses, contrary to Section 8-43-401 (2) (a), the specific 8% penalty provision.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The claimant sustained admitted work-related injuries to her upper extremities, consisting of bilateral thoracic outlet syndromes, on March 25, 1996.

2. On September 16, 1998, respondents filed a General Admission, admitting for temporary total disability benefits of $389.87 per week from March 24, 1996, to July 31, 1996, inclusive and for $342.56 per week from August 1, 1998, to September 9, 1998; also from September 10, 1998, to "unknown."

3. There is no dispute that general surgeon, H. Graeme French, M.D., a Board certified orthopedic surgeon and Richard F. Price, M.D., a psychiatrist, were within the authorized chain of referrals and therefore, authorized physicians.

4. Since December 1997, Robin K.J.S. Dhillon, M.D., had recommended a left supraclavicular brachial plexus release, scalenotomies and a possible first rib resection and release of the claimant's frozen left shoulder.

5. Dr. French recommended neurolysis or freeing of the nerves.

6. Drs. Dhillon and French planned on doing the operation on the claimant's left upper body at the same time in one operation. By letter of November 3, 1999, counsel for claimant advised that Dr. Dhillon retired. Therefore, Dr. French did the surgery alone on February 14/15, 2000.

7. By October 26, 1999, Dr. Price had diagnosed the claimant as having major depression, moderate, recurrent and chronic pain syndrome, secondary to her job-related shoulder problems. In Specific Findings of Fact, Conclusions of Law and Order, dated November 22, 1999, this ALJ found that the claimant's psychiatric diagnoses and treatment were causally related to her admitted work-related injuries of March 22, 1996, and that she had a need for continuing psychiatric treatment, which was causally connected to the admitted injury. No timely appeal of this Order was filed, and it became final.

8. As of October 26, 1999, all of the surgical, medical and psychiatric treatment recommended for the claimant was found to be reasonable, necessary and causally connected to her admitted compensable injuries of March 22, 1996, as determined in the November 22, 1999, Order.

9. Dr. Price's charges for ordered psychiatric care are:

June 19, 1998 $150.00

June 26, 1998 $100.00

October 16, 1999 $165.00

Dr. Price, as of August 4, 2000, had previously filed these charges with the insurance company, but the $412.40 has not been paid to date. The ALJ infers that Respondents

willfully and wantonly failed to pay these ordered charges in direct disobedience to a final order of an ALJ.

10. Because Dr. Price's bills have not been paid, he will not provide claimant further psychiatric care. Claimant tried to call Dr. Price recently, but he did not return her call.

11. The unappealed, final Conclusions of Law of November 22, 1999, provide in part:

> b. The psychiatric care and treatment recommended by Dr. Price, and sought by the claimant, is causally connected and reasonable and necessary, since the Workers' Compensation Act contemplates that an employer provide all treatments reasonably necessary to relieve a claimant from the effects of industrial injuries. *Durango v Dinagan,* 939 P.2d 496, 499 (Colo.App. 1997).

12. The unappealed and Final Order of November 22, 1999 provides in part:

> A. Respondents shall pay all medical costs connected with claimant's medical treatment, the recommended surgeries and the recommended psychiatric care and treatment, as well as the expenses of pre-surgical and pre-preparation and treatment. Claimant's treating physicians shall confer, work out and agree on the surgery or surgeries to be performed, as well as the time of the surgery or surgeries.
>
> B. Respondents shall pay for all of the claimant's reasonable and necessary psychiatric care and treatment related to the admitted compensable injury of March 22, 1996.

. . . .

13. At the hearing on October 26, 1999, concerning only medical benefits, the claimant had withdrawn her penalties application.

14. Respondent insurer, knew of Dr. Price's unpaid bills before October 28, 1998, and November 22, 1998.

15. Respondents have failed to pay, or delayed in paying the following other medical bills, that claimant incurred for the treatment of her work related injuries:

> Inland Imagining of February 15, 2000, "written off" as of August 16, 2000;
>
> Dr. French's bill of $110.00 of May 15, 26, 2000, as of July 19, 2000, mailing to David Kroll;
>
> Oregon Health Sciences University for $162.40 from October 8, 1999, and November 12, 1999, as of March 11, 2000, and January 12, 2000 (a non-payment of over thirty days, after notice, is undisputed);
>
> Whitman Hospital for $84.24 from February 15, 2000, as of May 3, 2000 (a non-payment of over thirty days, after notice, is proved);
>
> Whitman Hospital for $85.00 from February 14, 2000, as of August 10, 2000 (a non-payment of over thirty days, after notice, is proved); and
>
> Dr. French for RN surgical assistant from February 14/15, 2000, as of August 21, 2000.

16. Dr. French prescribed one month "In-Home Care" for claimant, which was requested for claimant, but denied by the respondent insurance company.

17. As to the failure to comply with the Administrative Law Judge's order to provide reasonable and necessary care: after October 16, 1999, psychiatric care, there

has been no care by Dr. Price; after the surgery of February 14/15, 2000, there has never been any in-home care provided to claimant; and, after the April 7, 2000, letter of Dr. Price, there has been no psychiatric care for claimant.

18. The ALJ infers that if Dr. Price's bill had been paid, he would have been more available to claimant and that claimant probably would have had additional psychiatric consultation or treatment.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. Claimant has the burden of proving, by a preponderance of the evidence, willful failure to obey an Order of an Administrative Law Judge; wilful failure to provide medical care; and willful failure to pay medical bills. Section 8-43-201, C.R.S. (1999).

b. For providing medical care and for payment of medical bills, there is a thirty day grace period before penalties accrue. Section 8-43-401(2)(a), C.R.S. (1999).

c. C.R.S. 8-43-304(1) provides in part that:

> Any . . . insurer, . . . who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel . . . as provided by said articles . . . shall also be punished by a fine of not more than five hundred dollars per day for each such offense . . .

d. C.R.S. 8-42-101(1)(a) provides:

> Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury.

e. C.R.S. 8-43-401(2)(a) provides in part that:

> After all appeals have been exhausted or in cases where there have been no appeals, all insurers . . . shall pay benefits within thirty days of when any benefits are due. If any insurer or self-insured employer willfully delays payment of medical benefits for more than thirty days, . . . such insurer or self-insured employer shall pay a penalty to the division of eight percent of the amount of wrongfully withheld benefits.

f. Although, as found, Respondents willful failure to obey this ALJ's Order of November 22, 1999, which was not appealed and became final, resulted specifically in the failure to pay, and discontinuation of, psychiatric treatment for the Claimant, the present status of the law that specific penalty provisions prevail over general penalty provisions mandates application of the specific 8% penalty provision contained in Section 8-43-401(2)(a). *Holliday v. Industrial Claim Appeals Office,* 997 P. 2d 1212 (Colo. App. 1999), *cert. granted,* May 15, 2000. Tough cases make hard law. In the exercise of judicial self-restraint, the ALJ is compelled to decide on the basis of existing case law, and not usurp the function of higher tribunals.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. From February 22, 2000, a penalty of 8% is assessed against the Respondents until Dr. Price is paid, or other psychiatric care is reinstated.

B. An eight percent (8%) penalty is assessed as to bills of:

Oregon Health Science University; and

Whitman Hospital

C. Interest of eight (8%) percent per annum is assessed against all amounts determined due hereunder.

D. All issues not determined herein are reserved for future decision.

DATED this 29 day of August, 2000.

DIVISION OF
ADMINISTRATIVE HEARINGS

BY: /s/ Edwin L. Felter, Jr.
Edwin L. Felter, Jr.
Administrative Law Judge

This decision is final and is not subject to appeal pursuant to C.R.S. 8-43-215 (1999) unless a Petition to Review is filed with the Division of Administrative Hearings, 1120 Lincoln Street, #1400, Denver, CO 80203 within twenty (20) days from the date this decision is mailed.

APPENDIX A-7

STATE OF COLORADO
EXECUTIVE DEPARTMENT

W.C. No. 4-293-203

SPECIFIC FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER UPON REMAND

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

LINDA GIDDINGS,

Claimant,

v

NORTHERN TELECOM,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurer,
Respondent.

Hearing in the above-captioned matter was held on August 21, 2000, in Denver, Colorado, before Edwin L. Fetter, Jr., Administrative Law Judge (ALJ), Colorado Division of Administration Hearings. The proceedings were tape recorded. By Final Order of January 8, 2001, The Industrial Claim Appeals Office (ICAO) affirmed the August 29, 2000 Specific Findings of Fact, Conclusions of Law and Order of the ALJ. Claimant appealed to the Court of Appeals, and on September 13, 2001, in *Giddings v. ICAO*, ___ P. 3d ___ (CA No. 01-CA-0077), the Court of Appeals set ICAO's Final Order aside and remanded the

matter with directions. The Supreme Court denied certiorari on January 22, 2002 and the Court of Appeals mandate issued on February 4, 2002. ICAO's Order of Remand issued on February 8, 2002. The gravamen of the reversal and remand is that failure to comply with an order of an ALJ regarding failure to pay medical benefits is different than a failure to pay medical benefits and is equivalent to an order of the director for purposes of Section 8-43-304 (1), regarding penalties up to $500 per day. The ALJ and ICAO relied on *Holliday v. ICAO,* 997 P. 2d 1212 (Colo. App. 1999) [*Holliday I*], which was subsequently disapproved in *Holliday v. Bestop, Inc.,* 23 P. 3d 700 (Colo. 2001) [*Holliday* II], wherein the Supreme Court held that the specific 8% penalty provision did not apply to the subsequent provision concerning persons who fail to obey an order. The Court, ultimately, determined that the ALJ had the discretion to apply either penalty provision.

Claimant appeared, telephonically, at the original August 21, 2000 hearing pursuant to an order of ALJ Michael E. Harr, dated June 12, 2000, and was represented by Jack Kintzele, Esq. Respondents were represented by David G. Kroll, Esq.

The issues to be determined were penalties for failure to provide psychiatric medical care in violation of an explicit ALJ Order, which was not appealed and became final, contrary to the provisions of Section 8-43-304(1), C.R.S. (1999), the general $500 per day penalty provision, and failure to pay medical expenses, contrary to Section 8-43-401(2)(a), the specific 8% penalty provision. The ALJ hereby determines that there is no need for additional evidence upon remand because the Court of Appeals enunciated a clarifying legal standard which gives the ALJ discretion to apply either the $500 per day penalty provision

or the specific 8% penalty provision to Respondents failure to obey the ALJ's previous Order to pay the Claimant's medical benefits.

ADDITIONAL FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant sustained admitted work-related injuries to her upper extremities, consisting of bilateral thoracic outlet syndromes, on March 25, 1996.

2. On September 16, 1998, Respondents filed a General Admission, admitting for temporary total disability benefits of $389.87 per week from March 24, 1996, to July 31, 1996, inclusive and for $342.56 per week from August 1, 1998, to September 9, 1998; also from September 10, 1998, to "unknown."

3. There is no dispute that general surgeon, H. Graeme French, M.D., a Board certified orthopedic surgeon, and Richard F. Price, M.D., a psychiatrist, were within the authorized chain of referrals and therefore, authorized physicians.

4. Since December 1997, Robin K.J.S. Dhillon, M.D., had recommended a left supraclavicular brachial plexus release, scalenotomies and a possible first rib resection and release of the claimant's frozen left shoulder.

5. Dr. French recommended neurolysis or freeing of the nerves.

6. Drs. Dhillon and French planned on doing the operation on the Claimant's left upper body at the same time in one operation. By letter of November 3, 1999,

counsel for Claimant advised that Dr. Dhillon retired. Therefore, Dr. French did the surgery alone on February 14/15, 2000.

7. By October 26, 1999, Dr. Price had diagnosed the Claimant as having major depression, moderate, recurrent and chronic pain syndrome, secondary to her job-related shoulder problems. In Specific Findings of Fact, Conclusions of Law and Order, dated November 22, 1999, this ALJ found that the Claimant's psychiatric diagnoses and treatment were causally related to her admitted work-related injuries of March 22, 1996, and that she had a need for continuing psychiatric treatment, which was causally connected to the admitted injury. No timely appeal of this Order was filed, and it became final.

8. As of October 26, 1999, all of the surgical, medical and psychiatric treatment recommended for the Claimant was found to be reasonable, necessary and causally connected to her admitted compensable injuries of March 22, 1996, as determined in the November 22, 1999, Order.

9. Dr. Price's charges for ordered psychiatric care are:

June 19, 1998	$150.00
June 26, 1998	$100.00
October 16, 1999	$165.00

Dr. Price, as of August 4, 2000, had previously filed these charges with the insurance company, but the $412.40 has not been paid to date. The ALJ infers that Respondents willfully and wantonly failed to pay these ordered charges in direct disobedience to a final order of an ALJ and the ALJ so finds. Respondents offered no persuasive evidence

in mitigation of their failure to obey the ALJ's November 22, 1999 Order.

10. Because Dr. Price's bills have not been paid, he will not provide Claimant further psychiatric care. Claimant tried to call Dr. Price recently, but he did not return her call. Although it is reasonable for a physician to refuse care without some assurance of payment therefore, it is unreasonable, egregious, and an aggravating factor for Respondents to deliberately fail to obey an ALJ's Order to make such payment.

11. The unappealed, final Conclusions of Law of November 22, 1999, provide in part:

> The psychiatric care and treatment recommended by Dr. Price, and sought by the claimant, is causally connected and reasonable and necessary, since the Workers' Compensation Act contemplates that an employer provide all treatments reasonably necessary to relieve a claimant from the effects of industrial injuries. *Durango v Dinagan,* 939 P.2d 496, 499 (Colo.App. 1997).

12. The unappealed and Final Order of November 22, 1999 provides in part:

> A. Respondents shall pay all medical costs connected with claimant's medical treatment, the recommended surgeries and the recommended psychiatric care and treatment, as well as the expenses of pre-surgical and pre-preparation and treatment. Claimant's treating physicians shall confer, work out and agree on the surgery or surgeries to be performed, as well as the time of the surgery or surgeries.

B. Respondents shall pay for all of the claimant's reasonable and necessary psychiatric care and treatment related to the admitted compensable injury of March 22, 1996.

. . . .

13. At the hearing on October 26, 1999, concerning only medical benefits, the claimant had withdrawn her penalties application.

14. Respondent insurer, knew of Dr. Price's unpaid bills before October 28, 1998, and November 22, 1998.

15. Respondents have failed to pay, or delayed in paying the following other medical bills, that Claimant incurred for the treatment of her work related injuries:

Inland Imaging of February 15, 2000, "written off" as of August 16, 2000; Dr. French's bill of $110.00 of May 15, 26, 2000, as of July 19, 2000, mailing to David Kroll;

Oregon Health Sciences University for $162.40 from October 8, 1999, and November 12, 1999, as of March 11, 2000, and January 12, 2000 (a non-payment of over thirty days, after notice, is undisputed);

Whitman Hospital for $84.24 from February 15, 2000, as of May 3, 2000 (a non-payment of over thirty days, after notice, is proved);

Whitman Hospital for $85.00 from February 14, 2000, as of August 10, 2000 (a non-payment of over thirty days, after notice, is proved); and

Dr. French for RN surgical assistant from February 14/15, 2000, as of August 21, 2000.

16. Dr. French prescribed one month "In-Home Care" for Claimant, which was requested for Claimant, but denied by the Respondent insurance company.

17. As to the failure to comply with the ALJ's order to provide reasonable and necessary care: after October 16, 1999, psychiatric care, there has been no care by Dr. Price; after the surgery of February 14/15, 2000, there has never been any in-home care provided to Claimant; and, after the April 7, 2000, letter of Dr. Price, there has been no psychiatric care for claimant.

18. The ALJ infers and finds that if Dr. Price's bill had been paid, he would have been more available to Claimant and that Claimant probably would have had additional psychiatric consultation or treatment. The ALJ further finds that Respondents failure to obey the ALJ's November 22, 1999 Order has retarded Claimant's recovery from the effects of her admitted, compensable injury.

19. Claimant has proven, by a preponderance of the evidence, that Respondents willfully disobeyed an Order of an ALJ to pay needed medical benefits. The claimant has further proven aggravating circumstances and Respondents have failed to prove any mitigating circumstances.

ADDITIONAL CONCLUSIONS OF LAW

Based upon the foregoing Additional Findings of Fact, the ALJ makes the following Additional Conclusions of Law:

a. Claimant has the burden of proving, by a preponderance of the evidence, failure to obey an Order of an Administrative Law Judge; failure to provide medical care; and failure to pay medical bills. Section 8-43-201, C.R.S.

(2001). *City of Boulder v. Streeb*, 706 P. 2d 786 (Colo. 1985). As found, the Claimant has sustained this burden.

b. For providing medical care and for payment of medical bills, there is a thirty day grace period before penalties accrue. Section 8-43-401(2)(a), C.R.S. (2001).

c. Section 8-43-304(1), C.R.S. (2001), provides in part that:

> Any . . . insurer, . . . who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel . . . as provided by said articles . . . shall also be punished by a fine of not more than five hundred dollars per day for each such offense . . .

d. Section 8-42-101(1)(a) provides:

> Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury.

e. Section 8-43-401(2)(a) provides in part that:

> After all appeals have been exhausted or in cases where there have been no appeals, all insurers . . . shall pay benefits within thirty days of when

> any benefits are due. If any insurer or self-insured employer willfully delays payment of medical benefits for more than thirty days, . . . such insurer or self-insured employer shall pay a penalty to the division of eight percent of the amount of wrongfully withheld benefits.

f. As found, Respondents willful failure to obey this ALJ's Order of November 22, 1999, which was not appealed and became final, resulted specifically in the failure to pay, and discontinuation of, psychiatric treatment for the Claimant. The holding in *Giddings v. Industrial Claim Appeals Office*, ___ P. 3d ___ (Colo. App. No. 01-CA-0077, September 13, 2001) gives the ALJ discretion to apply the general penalty provisions of up to $500 per day as provided by Section 8-43-304(1), C.R.S. (2001), or the specific 8% "penalties" provided by Section 8-43-401(2)(a), C.R.S. (1999). In light of the egregiousness of Respondents' willful disobedience of the Order to pay the Claimant's medical benefits, the ALJ is compelled to exercise his discretion in favor of the general $500 per day penalty provision as opposed to the specific 8% interest-penalty provision (in effect at the time of the violation). Also, in light of the aggravating circumstances, and the absence of persuasive mitigation, the ALJ concludes that a penalty in the maximum amount of $500 per day is warranted.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. From February 22, 2000 through August 21, 2000, both dates inclusive, a total of 182 days, a penalty of $500 per day is assessed against the Respondents, in the subtotal aggregate amount of $91,000, $68,250 of which is

payable to the Claimant and $22,750 of which is payable to the Subsequent Injury Fund, both sums being payable retroactively and forthwith.

B. From August 22, 2000 until Respondents obey the ALJ's Order of November 22, 1999, Respondents shall continue paying a penalty of $500 per day, $375 of which is payable to the Claimant and $125 of which is payable to the Subsequent Injury Fund.

C. Respondents shall pay interest of eight (8%) percent per annum on all amounts determined due hereunder and not paid when due.

D. All issues not determined herein are reserved for future decision.

DATED this 12 day of February, 2002.

/s/ Edwin L. Felter, Jr.
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the Administrative Law Judge is final and is not subject to appeal unless a Petition to Review is filed with the Division of Administrative Hearings, 1120 Lincoln Street, #1400, Denver, CO 80203 within twenty (20) days from the date this decision is mailed.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 13 day of February, 2002, a true and correct copy of the foregoing **SPECIFIC FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** was mailed by United

States mail, first-class, postage prepaid, addressed as follows:

Jack Kintzele, Esq.
1317 Delaware Street
Denver, CO 80204

Linda Giddings
P.O. Box 748
Mossyrock, WA 98564

Liberty Mutual Ins. Co.
Attn: Mary Anders
P.O. Box 168208
Irving, TX 75016

Liberty Mutual Ins. Co.
Attn: Frank Boissoneau
P.O. Box 3539
Englewood, CO 80155

Northern Telecom
Attn: Darlene Hinson
2221 Lakeside Blvd.
Richardson, TX 75082

David Kroll, Esq.
1120 Lincoln Street #1606
Denver, CO 80203

Northern Telecom, Inc.
200 Athens Way
Nashville, TN 37228-1308

Division of Workers Compensation (delivered)

/s/ [Illegible]
Secretary

APPENDIX A-8

STATE OF COLORADO

EXECUTIVE DEPARTMENT

CASE W.C. No. 4-293-203

IN THE MATTER OF THE CLAIM OF LINDA GIDDINGS, Claimant, vs. NORTHERN TELECOM, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurer, Respondent.	)	TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing pursuant to notice on August 21, 2000, in the offices of the Division of Administrative Hearings, The Chancery, 1120 Lincoln Street, Suite 1400, Denver, Colorado, before:

EDWIN FELTER, JR., Administrative Law Judge

APPEARANCES:

For the Claimant: Jack Kintzele, Esq.

For the Respondents: David Kroll, Esq.

[2] INDEX

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
Claimant's:				
Linda Giddings	21	25	–	–

[3] PROCEEDINGS

(Whereupon, additional cases were discussed at the beginning of the proceedings which were not related to this case, and therefore were not transcribed.)

(Whereupon, there were multiple inaudibles due to technical difficulties with the recording.)

ADMINISTRATIVE LAW JUDGE FELTER: Very well, call the case of Giddings v. Northern Telecom Inc., WC No. 4-293-203. The record should reflect – is the claimant present, Mr. Kintzele?

MR. KINTZELE: She'll be present by telephone, Your Honor.

JUDGE FELTER: Okay. You'll have to dial in your stuff (inaudible). We might as well have the claimant present by telephone. And you're agreeable to this, Mr. Kroll?

MR. KROLL: Yes, that's right.

JUDGE FELTER: Okay, Mr. Kintzele, why don't you come up and dial the claimant. Start the speaker first. Two 9's to get out.

(Whereupon, Mr. Kintzele placed a telephone call to the claimant.)

MR. KINTZELE: Linda, I'm going to put you on speaker, just a second.

JUDGE FELTER: I hope that works.

[4] MR. KINTZELE: Linda?

MS. GIDDINGS: Yes?

MR. KINTZELE: Okay.

JUDGE FELTER: Okay, we just got on the record, my name is Edwin L. Felter, Jr., administrative law judge with the Division of Administrative Hearings. I've called the case of Giddings v. Northern Telecom, WC No. 4-293-203. The record should reflect that the claimant is present by telephone pursuant to agreement. Claimant is represented by Jack Kintzele, Attorney-at-Law, who is present in person. The respondents are represented by David Kroll, Attorney-at-Law.

This matter is set on the issue of penalties versus the respondents for failure to pay medical bills, and after I look at this, your failure to obey my previous order, Mr. Kintzele?

MR. KINTZELE: That's correct, Your Honor.

JUDGE FELTER: Okay, my order of November 22nd, 1999.

MR. KINTZELE: Correct.

JUDGE FELTER: Was that order appealed?

MR. KINTZELE: No, that's fine.

JUDGE FELTER: Okay, final order. Now, I'm going to take a minute to – I've been handed the claimant's submissions 1 through 18, any objection, Mr. Kroll?

[5] MR. KROLL: Yes, actually, Your Honor, I probably would object to the majority of the submissions.

JUDGE FELTER: On what basis?

MR. KROLL: Well, a lot of them are correspondence with I think what has to be a foundational type (inaudible).

JUDGE FELTER: You object to the correspondence?

MR. KROLL: Yeah, I can go through it specifically.

JUDGE FELTER: Well, they're from Mr. Kintzele to your clients. Okay, some of them, I'm looking. Okay, why don't we categorically go through them, Mr. Kroll. 1 you have no objection to –

MR. KROLL: That's fine.

JUDGE FELTER: – because I can take administrative notice of that. 2?

MR. KROLL: That would appear to be (inaudible) Mr. Kintzele, which I'd require foundation on.

JUDGE FELTER: Well, how do we do that without Mr. Kintzele becoming a witness?

MR. KROLL: Well, I think that might be impossible (inaudible) wasn't endorsed to be a witness.

JUDGE FELTER: Well, what we usually do on these things is, do you have any objections as to the authenticity or any specifics as to this not having been sent?

MR. KROLL: Well, I'd have to – I'd have to go back through my file and figure out if it was sent on or around [6] that day.

JUDGE FELTER: You are copied on it, Mr. Kroll. I'm on 2 right now. You didn't get the copy of it?

MR. KROLL: I'm not sure, I don't (inaudible) on that. The other –

JUDGE FELTER: Well, wait a minute, wait a minute, let's stick to the question on the floor.

MR. KROLL: Okay.

JUDGE FELTER: January 7, 2000, letter from Mr. Kintzele to Ms. Anders, presumably of Liberty Mutual, copied to you, Mr. Kroll. You didn't get the copy of that as officer of the tribunal?

MR. KROLL: Yeah, I don't have a recollection of this January 7 –

JUDGE FELTER: You don't have a recollection. Okay. All right, so you object to 2. Okay, let's go on to 3.

MR. KROLL: The second objection, basic objection to 2 is that my understanding of the medical – the issue for hearing is a pay issue for failing to pay bills for Dr. Price.

JUDGE FELTER: Well, it seems to be a penalty issue for failing to obey my order of November, that's what

Mr. Kintzele said, which might be a little bit different matter than just failure to pay meds.

[7] MR. KROLL: Well, we object to the Application for Hearing.

JUDGE FELTER: So it's penalties – okay.

MR. KROLL: (Inaudible.)

JUDGE FELTER: Oh, yeah, "Penalty for failure to provide psychiatric in violation of ALJ's order and failure to pay medical."

MR. KROLL: I believe it's Dr. Price (inaudible) relevant. It makes particular mention of two different bills, one – it talks about Dr. Price and it talks about – after that it talks about (inaudible).

JUDGE FELTER: Yeah.

MR. KROLL: (Inaudible) at issue based on (inaudible).

JUDGE FELTER: Well, I don't see any jury, I could disregard the irrelevant, I suppose. Okay, you've got an objection to 2. Why don't we move on to 3, another – a letter to you, Mr. Kroll, and Ms. Andres.

MR. KROLL: Well, once again, it's the same objection, and of course (inaudible).

JUDGE FELTER: It has bills attached to it. Okay, how about 4? That's an operative report, you don't have an objection –

MR. KROLL: Of course, once again, I don't understand this as a relevancy issue to the psychiatric care [8] because this is a surgical (inaudible).

JUDGE FELTER: Well, if it's not relevant – penalties are – you know, failure to pay bills are all that's relevant.

MR. KROLL: Well, I think it's also psychiatric bills specifically.

JUDGE FELTER: Mr. Kroll, my instruction may differ because it does talk psychiatric and medical care in violation of my order and failure to pay medical expenses, and maybe the eight percent are in there in addition. And I'm assuming for now, maybe wrongly, that Mr. Kintzele wouldn't be offering all these medical reports unless they related to his penalty theory that there wasn't a timely payment.

MR. KROLL: Well, I don't know, I was of the impression he was just talking about Dr. Price's bills and –

JUDGE FELTER: Well, I'm not. I'm not. A plain reading of his first sentence in the conjunctive, failure to pay psychiatric in violation of my order –

MR. KROLL: Well, Judge –

JUDGE FELTER: – and failure to pay medical expenses, period.

MR. KROLL: Yeah, it does say to provide –

JUDGE FELTER: There's a period at the end.

MR. KROLL: – provide psychiatric medical care and [9] (inaudible).

JUDGE FELTER: Yeah, so he's got two issues there. One is disobeying my order, allegedly, and two is failing to pay medical bills; is that correct, Mr. Kintzele?

MR. KINTZELE: Yes, Your Honor.

JUDGE FELTER: Thank you. So we've got two issues. So that deals – that takes care of the relevancy of the other bills. I mean, if they – if you can't show that there was not a payment, I mean they're not relevant, but – okay, so we're down to operative report – okay, that's a medical report. 4, 5 –

MR. KROLL: Well, 5, once again, and this is a medical report, my objection is the relevancy (inaudible).

JUDGE FELTER: Okay. The objections as to relevancy are overruled on medical bills because of my statement of the issues. Now, do you have other objections to these medical bills?

MR. KROLL: No. 6 and 7, once again, are correspondence –

JUDGE FELTER: Okay, objection –

MR. KROLL: – I've indicated my objection to correspondence. No. 8 is okay with me.

JUDGE FELTER: Okay. 9, another bill.

MR. KROLL: Okay. Once again, my objection is relevancy.

[10] JUDGE FELTER: Overruled. Your objection is preserved on medical bills as to relevancy and overruled, but –

MR. KROLL: Now, 11, I've never seen this one before, and –

JUDGE FELTER: Was that exchanged, Mr. Kintzele, within 20 days?

MR. KINTZELE: I believe it was, Your Honor. My practice is when I receive a bill or record to tender it.

JUDGE FELTER: Okay, well, we'll have to deal with that. I'll just put a question mark next to 11. Okay, order, that's okay; 13, correspondence to Mr. Kroll, objection to that?

MR. KROLL: Well, that's okay, I mean he's just saying that he's got these bills.

JUDGE FELTER: Okay, we're going to deal with –

MR. KROLL: But again, I don't know the relevance.

JUDGE FELTER: I'm going through a sifting process and we'll see. Okay, 14 is correspondence to Liberty Mutual by Mr. Kintzele, copy to Mr. Kroll.

MR. KROLL: Once again –

JUDGE FELTER: (Inaudible) objection, okay, we're narrowing it. Notice of Hearing, that's okay, correspondence – 16, okay, copy to Mr. Kroll, it's to "Dear Addressee". Okay, we'll put an objection there. 17, [11] correspondence to Mr. Kroll. And you're representing as an officer of this tribunal, Mr. Kroll, that although you are noted either the addressee or noted as a recipient of a copy, you have no recollection of having received these?

MR. KROLL: Well, (inaudible).

JUDGE FELTER: Okay. Okay, 18's okay, it's a medical bill, a write-off, same as a bill. Okay, let's deal with the objections to 2, 3, 6, 7, 13, 14, 16, which are foundational objections because they were sent by Mr. Kintzele, who can't really become a witness. And if Mr.

Kroll is copied, Mr. Kroll gets to represent as an officer of the tribunal that he has no recollection of these, probably because of the time. Mr. Kintzele, as an officer of the tribunal, do you represent that these items were sent when they were represented to have been sent?

MR. KINTZELE: Yes, Your Honor.

JUDGE FELTER: Okay. And sent to everyone who is noted on copy?

MR. KINTZELE: Oh, yes, Your Honor.

JUDGE FELTER: Okay. Well, do you have any specific indication that anything is different than as Mr. Kintzele has represented on these items? He's representing he sent them when he sent them as reflected in the date and he sent them to whom he sent them, to the people reflected, either as addressees or to the people noted on the copy. [12] He's representing that as an officer of the tribunal.

MR. KROLL: Well, I understand, Your Honor, but of course what I suspect is that (inaudible) somebody else in his office (inaudible). Now, I don't know, I guess I could cross-examine him –

JUDGE FELTER: No, I want – you may suspect, we're not dealing with suspicions right now, we're dealing with something that appears to be in hearing. I realize the rules of evidence lock, stock and barrel are applicable to Worker's comp as opposed to other administrative law proceedings, but I can state at the outset we're dealing with documents that appear to be inherently reliable as represented, and suspicions won't really cut it. Now, I mean if you have something specific that there's something wrong on the dates or something wrong on the

addressee, such as – I mean, can you point to one of these and say, "Boy, he may have noted a copy but we never got it, I can positively state we never got it"? I mean, is there anything along those lines?

MR. KROLL: Well, no, I guess (inaudible) I can't say 100 percent that this didn't appear (inaudible).

JUDGE FELTER: You can't say 100 percent, you can't really say at all, can you, Mr. Kroll –

MR. KROLL: Well, no, I –

JUDGE FELTER: – whether you got it or not, right?

MR. KROLL: Right.

[13] JUDGE FELTER: Right. And you don't even have a suspicion that you did not get them, do you?

MR. KROLL: Well, I have a suspicion that they aren't in my file, but like I say, I can't say –

JUDGE FELTER: They are not in your file, that's what you're saying?

MR. KROLL: Right.

JUDGE FELTER: All right.

MR. KROLL: Of course I don't know if it had something to do with my poor filing practices or not, but –

JUDGE FELTER: Well, we might put that (inaudible) issue, but – Mr. Kintzele, you want some of these entered. I know what the relevancy is, alleged relevancy is, but I entered an order, you allege that it wasn't complied with, and after I entered the order, you

made requests – that's what it appears to be – to comply and outlined the bills that were unpaid. Can you help me out on why – bearing in mind if this were just another administrative law proceeding these items would be admissible. Ordinarily I used to get around that when I was an attorney general, I'd try – of course I wasn't the judge – I'd try to get a stipulation that "Hey, look, you know, do you need to call me as an authenticity witness?" Essentially, that's the kind of witness Mr. Kintzele would be, but he can't be a witness without recusing himself from these proceedings.

[14] It seems like, you know, technically you may be correct, maybe not, unless Mr. Kintzele can point me to the Colorado Rules of Evidence specifically what in the Colorado Rules of Evidence would let me admit these letters which you've generated, Mr. Kintzele, without any further foundation.

MR. KINTZELE: Judge, you've already found that they're inherently reliable, and –

JUDGE FELTER: Well, where is that, what rule is that in the Rules of Evidence?

MR. KINTZELE: That's the last exception to the hearsay rule, I think it's 24 or 25.

JUDGE FELTER: Okay. "Hearsay Exceptions." Rules of Evidence are so liberal, I mean when people (inaudible) cite that administrative law exception, I say, "Well, what do we need that for with the Colorado Rules of Evidence?" Okay, "Other Exception," 24, "A statement" – and we're talking first about Rule 803, Subsection 24 – "A statement not specifically covered by any of the foregoing

exceptions but having a (inaudible) circumstantial guarantee of trustworthiness if the Court determines that: (a) the statement is offered as evidence of a material fact" – yeah – "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts" – I'm not sure what other evidence of, you know, "We [15] want the medical bills paid," who other than the lawyer is going to be pressing it, saying, "Gee, the medical bills haven't been paid," other than of course the medical providers who send these to collection agencies – "(c) the general purposes of these rules and interests of justice will best be served by admission of the statements; however, a statement may not be admitted under this exception unless the proponent of it makes known to adverse parties sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare and meet it. His intention to offer the statement and the particulars of it – "

Okay. You can –

MR. KROLL: Well, Your Honor –

JUDGE FELTER: I'm not finished yet, Mr. Kroll. There's a question of the 20-day exchange, at least from Mr. Kroll's – well, Mr. Kroll, you got – do you have any question about getting these 20 days – more than 20 days from now, every single document?

MR. KROLL: Well, okay, a lot of the bills –

JUDGE FELTER: No, no, no, let me ask you this: there are letters of Mr. Kintzele you're objecting to –

MR. KROLL: Right.

JUDGE FELTER: – where you're the addressee or you're noted as getting a copy. Now, as far as this as an exhibit packet that's been offered, do you – did you get these [16] more than 20 days before today or did you just see them today?

MR. KROLL: Well, no, I just saw most of them today.

JUDGE FELTER: You didn't get them –

MR. KROLL: A couple I saw before, but most of them (inaudible).

JUDGE FELTER: Oh, there wasn't an exchange more than 20 days in accordance to the rules?

MR. KROLL: Let's see, the ones that are attached to the Application for Hearing, of course, I got, and that had one of the letters.

JUDGE FELTER: Yeah. You have some specific objection – the application – I don't know what was attached to the Application for Hearing.

MR. KROLL: It was the letter from Dr. Price dated April 7th.

JUDGE FELTER: March 16th, okay, there's a March 16th. Let me find that. Okay.

MR. KROLL: Yeah, March 16th letter and –

JUDGE FELTER: You got that more than 20 days.

MR. KROLL: Yeah, and a letter from Dr. Price dated April 7th.

JUDGE FELTER: Okay. And Dr. Price, that's a medical record. Okay. So that's all that was attached. [17] Now, what efforts – so you concede the March 16th, 2000, letter that you received it, correct?

MR. KROLL: Well, right, it was attached to the Application for Hearing.

JUDGE FELTER: Okay. Now, okay, that may take care of that. Now, and the others, you can't – you just saw them today for the first time, right?

MR. KROLL: With the exception of the August 7, No. 17.

JUDGE FELTER: August 17th? August 7th. Okay, right, right, that's – okay. Well, okay, Mr. Kintzele, we're going to sift through this, and whether there will be other hearings – so based on your representations, Mr. Kroll, as an officer of the tribunal, you haven't had an opportunity to deal with 2, 3, 13, 14 and 16, but you have had an opportunity to deal with 6 and 17. Now, what efforts have you made to check these two items out that you've known about for more than 20 days? In other words –

MR. KROLL: Well, the ones I know I got in 20 days I don't have an objection to.

JUDGE FELTER: Okay. Okay, no objection. All right, no objection. Very well, we'll just strike that. No objection. So we've got objections to 2, 3, 7, 13, 14 and 16, and then I have a question mark next to 11, it's a ledger entry. Let me see, that's a self-authenticating document.

[18] MR. KROLL: Yeah, I had not seen that –

JUDGE FELTER: Okay. So the objection is you haven't really had a chance to deal with it specifically.

Mr. Kintzele, what is your pleasure with respect to these – with respect to 2, 3, 13, 14, 16 and, well, let's put 11 in there because – we have two choices, Mr. Kintzele, and that is proceed today without them or let's give Mr. Kroll an opportunity to deal with them, get a quick recess so he can come up with some specific objections if he can't undercut them or challenge their validity.

MR. KINTZELE: Judge, I would point out on 16, that's addressed to this division and also Division of Worker's Comp and should be a portion of the official record.

JUDGE FELTER: You're correct. Okay, that objection's gone on 16, and I'm sorry. I can take administrative notice of that. Now, with – we've got 2, 3, 7, 11, 13 and 14 on the table. Well, I guess because the Colorado Rules of Evidence are applicable and there's a surface appeal for me to say, you know, we've got offers of the tribunal representing this, this and that, but I don't see any place in the rules of evidence that make that kind of exception that you can suspend the rules when offers of the tribunal represent the documents are okay. What's your pleasure with respect to those exhibits, Mr. Kintzele?

MR. KINTZELE: We'd like to have a hearing.

[19] JUDGE FELTER: Today?

MR. KINTZELE: Yes.

JUDGE FELTER: Okay. Very well, the objection to 2 is sustained, the objection to 3 is sustained, the objection to 7 is sustained, the objection to 11 is sustained,

unless – well, I'm going to hold 11, is there a way you can lay a better foundation to 11?

MR. KINTZELE: That's included with 16, Your Honor, which Your Honor just admitted, so we'd withdraw 11.

JUDGE FELTER: Okay, withdrawn. Okay. Objection to 13 is sustained and objection to 14 is sustained. Okay. Okay, claimant's submissions, with the exceptions of 2, 3, 7, 11, 13 and 14 are – there's no further objection, correct, Mr. Kroll?

MR. KROLL: No, (inaudible).

JUDGE FELTER: They're admitted into evidence. (Whereupon, the claimant's exhibits were received in evidence.)

JUDGE FELTER: Okay, Mr. Kroll, do you have any submissions at this time?

MR. KROLL: No, Your Honor.

JUDGE FELTER: Okay, no submissions. Very well. Mr. Kintzele, do you really need testimonial evidence?

MR. KINTZELE: Yes, probably –

JUDGE FELTER: Okay.

[20] MR. KINTZELE: – just about five questions.

JUDGE FELTER: Okay. Call your first witness.

MR. KINTZELE: Call the claimant, please.

JUDGE FELTER: Okay.

MR. KINTZELE: She should be on the phone, hopefully.

JUDGE FELTER: Okay, Ms. Giddings, are you there?

THE CLAIMANT: Yes, sir.

JUDGE FELTER: Okay, would you please raise your right hand?

THE CLAIMANT: Yes, sir.

LINDA GIDDINGS,

having been first duly sworn, was examined and testified as follows:

JUDGE FELTER: Okay, would you please state your full name for the record?

THE WITNESS: Linda Mary Giddings.

JUDGE FELTER: And spell your last name, please.

THE WITNESS: G-i-d-d-i-n-g-s.

JUDGE FELTER: Okay, and what's your present address?

THE WITNESS: Post Office Box 748, Mossyrock, Washington 98546.

JUDGE FELTER: 98564. Mossyrock spelled M-o-s-s-y?

THE WITNESS: – r-o-c-k.

* * *

APPENDIX B-1

COLORADO REVISED STATUTES

§ 8-42-101. Employer must furnish medical aid – approval of plan – fee schedule – contracting for treatment – no recovery from employee – medical treatment guidelines – accreditation of physicians – repeal

(1)(a) Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury.

(b) In all cases where the injury results in the loss of a member or part of the employee's body, loss of teeth, loss of vision or hearing, or damage to an existing prosthetic device, the employer shall furnish within the limits of the medical benefits provided in paragraph (a) of this subsection (1) one artificial member, glasses, a hearing aid, a brace, and any other external prosthetic device, including dentures, which are reasonably required to replace or improve the function of each member or part of the body or prosthetic device so affected or to improve the employee's vision or hearing. The employee may petition the division for a replacement of any artificial member, glasses, hearing aid, brace, or other external prosthetic device, including dentures, upon grounds that the employee has undergone an anatomical change since the previous device was furnished, and that the anatomical change is directly related to and caused by the injury, and that the replacement is necessary to improve the function of each member

or part of the body so affected or to relieve pain and discomfort. Implants or devices necessary to regulate the operation of, or to replace, with implantable devices, internal organs or structures of the body may be replaced when the authorized treating physician deems it necessary. Every employer subject to the terms and provisions of articles 40 to 47 of this title must insure against liability for the medical, surgical, and hospital expenses provided for in this article, unless permission is given by the director to such employer to operate under a medical plan, as set forth in subsection (2) of this section.

(c) In any case in which a firefighter, emergency medical services provider, or peace officer, as described in section 16-2.5-101, C.R.S., is exposed during the course and within the scope of employment to a known or possible source of hepatitis C, the employer, or if insured, the insurer, shall, at their expense, provide for baseline testing within the period of time specified in section 8-41-208(1)(a) to determine whether the employee was free of hepatitis C at the time of the on-the-job exposure. The employer, or if insured, the insurer, shall pay for all reasonable and necessary medical procedures and treatment for exposure to hepatitis C during the period of time set forth in section 8-41-208(1)(d).

(2) Every such plan, which is agreed to between the employer and employee, for the furnishing of medical, surgical, and hospital treatment, whether or not the employee is to pay any part of the expense of such treatment, before being put into effect, shall receive the approval of the director. The director has full power to formulate the terms and conditions under which any such plan may operate and the essentials thereof, and at any time the director may order modifications or changes in

any such plan or withdraw prior approval thereof. No plan shall be approved by the director which relieves the employer from the burden of assuming and paying for any part of the medical, surgical, and hospital services and supplies required.

(3)(a)(I) The director shall establish a schedule fixing the fees for which all medical, surgical, hospital, dental, nursing, and vocational rehabilitation treatment rendered to employees under this section shall be compensated, and it is unlawful, void, and unenforceable as a debt for any physician, chiropractor, hospital, person, or institution to contract with, bill, or charge any patient for services, rendered in connection with injuries coming within the purview of this article or an applicable fee schedule, which are or may be in excess of said fee schedule unless such charges are approved by the director. Fee schedules shall be reviewed on or before July 1 of each year by the director, and appropriate health care practitioners shall be given a reasonable opportunity to be heard as required pursuant to section 24-4-103, C.R.S., prior to fixing the fees, impairment rating guidelines which shall be based on the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment", in effect as of July 1, 1991, and medical treatment guidelines and utilization standards. The director shall promulgate rules and regulations concerning reporting requirements, penalties for failure to report correctly or in a timely manner, utilization control requirements for services provided under this section, and the accreditation process in subsection (3.6) of this section.

(II) Notwithstanding the provisions of subparagraph (I) of this paragraph (a) the fees set forth in the schedule established pursuant to subparagraph (I) of this paragraph

(a) shall be those fees in effect immediately prior to July 1, 1991, and such fees shall remain in effect until July 1, 1995.

(III) Notwithstanding the provisions of subparagraph (I) of this paragraph (a), until the impairment rating guidelines and medical treatment guidelines and utilization standards required by subparagraph (I) of this paragraph (a) and subsection (3.5) of this section are adopted and level I accreditation is received, compensation for fees for chiropractic treatments shall not be made more than ninety days after the first of such treatments nor after the twelfth such treatment, whichever first occurs, unless the chiropractor has received level I accreditation.

(b) Medical treatment guidelines and utilization standards, developed by the director, shall be used by health care practitioners for compliance with this section.

(3.5)(a)(I) "Physician" means, for the purposes of the level I and level II accreditation programs, a physician licensed under the "Colorado Medical Practice Act". For the purposes of level I accreditation only and not level II accreditation, "physician" means a dentist licensed under the "Dental Practice Law of Colorado", a podiatrist licensed under the provisions of article 32 of title 12, C.R.S., and a chiropractor licensed under the provisions of article 33 of title 12, C.R.S. No physician shall be deemed to be accredited under either level I or level II solely by reason of being licensed.

(II) The director shall promulgate rules establishing a system for the determination of medical treatment guidelines and utilization standards and medical impairment rating guidelines for impairment ratings as a percent of the whole person or affected body part based on the

revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment", in effect as of July 1, 1991.

(b) A medical impairment rating system shall be maintained by the director.

(c)(I) This subsection (3.5) is repealed, effective July 1, 2014.

(II) Prior to such repeal the accreditation process created by this subsection (3.5) and subsection (3.6) of this section shall be reviewed as provided for in section 24-34-104, C.R.S.

(3.6) The two-tier accreditation system shall comprise the following programs:

(a)(I) A program establishing the accreditation requirements for physicians providing primary care to patients who have, as a result of their injury, been unable to return to work for more than three working days, referred to in this section as "time-loss injuries", which program shall be voluntary except in the case of chiropractors, for whom it shall be mandatory, and which shall be known as level I accreditation; and

(II) A program establishing the accreditation requirements for physicians providing impairment evaluation of injured workers, which program shall be known as level II accreditation.

(b) A physician who provides impairment evaluation of injured workers shall complete and must have received accreditation under the level II accreditation program. However, the authorized treating physician providing primary care need not be level II accredited to determine

that no permanent medical impairment has resulted from the injury. Specialists who do not render primary care to injured workers and who do not perform impairment evaluations do not require accreditation. The facility where a physician provides such services cannot be accredited.

(c) Both the level I and level II accreditation programs shall be implemented and available to physicians. All physicians who are required to be accredited shall complete the level II accreditation program or programs.

(d) The level I and level II accreditation programs shall operate in such a manner that the costs thereof shall be fully met by registration fees paid by the physicians. The registration fee for level I accreditation shall not exceed two hundred fifty dollars, and the registration fee for level II accreditation shall not exceed four hundred dollars. The registration fee for each program shall cover the cost of all accreditation course work and materials.

(e) The accreditation system shall be established so as to provide physicians with an understanding of the administrative, legal, and medical roles and in such a manner that accreditation is accessible to every licensed physician, with consideration of specialty and geographic diversity.

(f) Initial accreditation shall be for a three-year period and may be renewed for successive three-year periods. The director by regulation may determine any additional training program required prior to accreditation renewal.

(g) The director shall, upon good cause shown, revoke the accreditation of any physician who violates the

provisions of this subsection (3.6) or any rule promulgated by the director pursuant to this subsection (3.6), following a hearing on the merits before an administrative law judge, subject to review by the industrial claim appeals office and the court of appeals, in accordance with all applicable provisions of article 43 of this title.

(h) If a physician whose accreditation has been revoked submits a claim for payment for services rendered subsequent to such revocation, the physician shall be considered in violation of section 10-1-128, C.R.S., and neither an insurance carrier nor a self-insured employer shall be under any obligation to pay such claim.

(i) A physician who provides treatment for nontime loss injuries need not be accredited to be reimbursed for the costs of such treatment pursuant to the provisions of the "Workers' Compensation Act of Colorado".

(j) Deleted by Laws 1996, H.B.96-1126, § 2, eff. July 1, 1996.

(k) The division shall make available to insurers a list of all accredited physicians and a list of all physicians whose accreditation has been revoked. Such lists shall be updated on a monthly basis.

(*l*) The registration fees collected pursuant to paragraph (d) of this subsection (3.6) shall be transmitted to the state treasurer, who shall credit the same to the physicians accreditation program cash fund, which is hereby created in the state treasury. Moneys in the physicians accreditation program cash fund are hereby continuously appropriated for the payment of the direct costs of providing the level I and level II accreditation courses and materials.

(m) All administrative costs associated with the level I and level II accreditation programs shall be paid out of the workers' compensation cash fund in accordance with appropriations made pursuant to section 8-44-112(7).

(n) The director shall contract with the medical school of the university of Colorado for the services of a medical director to advise the director on issues of accreditation, impairment rating guidelines, medical treatment guidelines and utilization standards, and case management and to consult with the director on peer review activities as specified in this subsection (3.6) and section 8-43-501. Such medical director shall be a medical doctor licensed to practice in this state with experience in occupational medicine. The director may contract with an appropriate private organization which meets the definition of a utilization and quality control peer review organization as set forth in 42 U.S.C. sec. 1320c-1(1)(A) or (1)(B), to conduct peer review activities under this subsection (3.6) and section 8-43-501 and to recommend whether or not adverse action is warranted.

(o) Except as provided in this subsection (3.6), neither an insurance carrier nor a self-insured employer or injured worker shall be liable for costs incurred for an impairment evaluation rendered by a physician where there is a determination of permanent medical impairment if such physician is not level II accredited pursuant to the provisions of this subsection (3.6).

(p)(I) For purposes of this paragraph (p):

(A) "Case management" means a system developed by the insurance carrier in which the carrier shall assign a person knowledgeable in workers' compensation health care to communicate with the employer, employee, and

treating physician to assure that appropriate and timely medical care is being provided.

(B) "Managed care" means the provision of medical services through a recognized organization authorized under the provisions of parts 1, 3, and 4 of article 16 of title 10, C.R.S., or a network of medical providers accredited to practice workers' compensation under this subsection (3.6).

(II) Every employer or its insurance carrier shall offer at least managed care or medical case management in the counties of Denver, Adams, Jefferson, Arapahoe, Douglas, Boulder, Larimer, Weld, El Paso, Pueblo, and Mesa and shall offer medical case management in all other counties of the state.

(q) The division is authorized to accept moneys from any governmental unit as well as grants, gifts, and donations from individuals, private organizations, and foundations; except that no grant, gift, or donation may be accepted by the division if it is subject to conditions which are inconsistent with this article or any other laws of this state or which require expenditures from the workers' compensation cash fund which have not been approved by the general assembly. All moneys accepted by the division shall be transmitted to the state treasurer for credit to the workers' compensation cash fund.

(r)(I) This subsection (3.6) is repealed, effective July 1, 2014.

(II) Prior to such repeal the accreditation process created by subsection (3.5) of this section and this subsection (3.6) shall be reviewed as provided for in section 24-34-104, C.R.S.

(3.7) On and after July 1, 1991, all physical impairment ratings used under articles 40 to 47 of this title shall be based on the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment", in effect as of July 1, 1991. For purposes of determining levels of medical impairment pursuant to articles 40 to 47 of this title a physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings.

(4) Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

APPENDIX B-2

§ 8-43-503. Utilization review of health care providers

(1) The general assembly hereby finds and determines that health care providers that provide medical care or health care services that are not reasonably necessary or not reasonably appropriate according to accepted professional standards should not be allowed to provide such services to workers' compensation claimants. The general assembly, therefore, hereby declares that the purpose of the utilization review process authorized in this section is to provide a mechanism to review medical care or health care services rendered pursuant to this article that may not be reasonably necessary or reasonably appropriate according to accepted professional standards and to provide a mechanism to prevent such health care providers from providing medical care or health care services.

(2) The provisions relating to the procedures for utilization review found in section 8-43-501(2), (3), (4), (5)(a), (5)(c), and (5)(d) shall apply to utilization review under this section. A unanimous vote by the committee created in section 8-43-501(3) shall be required for a recommendation to the director that a health care provider not be allowed to provide medical care or health care services to claimants.

(3) Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment. Nothing in this subsection (3) shall be construed to abrogate any managed care or cost containment measures authorized in articles 40 to 47 of this title.

APPENDIX B-3

§ 8-43-304. Violations – penalty – offset for benefits obtained through fraud

(1) Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than five hundred dollars per day for each such offense, seventy-five percent payable to the aggrieved party and twenty-five percent to the subsequent injury fund created in section 8-46-101.

(2) An insurer or self-insured employer may take a credit or offset of previously paid workers' compensation benefits or payments against any further workers' compensation benefits or payments due a worker when the worker admits to having obtained the previously paid benefits or payments through fraud, or a civil judgment or criminal conviction is entered against the worker for having obtained the previously paid benefits through fraud. Benefits or payments obtained through fraud by a worker shall not be included in any data used for rate-making or individual employer rating or dividend calculations by any insurer or by Pinnacol Assurance.

(3) The director and each administrative law judge shall report to the division each time a penalty is imposed

pursuant to this section. Each such report shall include the amount of the penalty, the name of the administrative law judge awarding the penalty, if applicable, and the name of the offending party.

(4) In any application for hearing for any penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted. After the date of mailing of such an application, an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation.

(5) A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty.